IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-601

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON, WALTER V. BROOKS, JR.,

Petitioners,

—*v.*—

CARLA A. HILLS, Secretary, Department of Housing and Urban Development, JOSEPH D. MONTICCIOLO, Area Director, New York Office Department of Housing and Urban Development, S. WILLIAM GREEN, Regional Administrator, Department of Housing and Urban Development, THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THOMAS S. KLEPPE, Secretary of the Department of the Interior, DARREL LEWIS, Director of the Bureau of Outdoor Recreation of the Department of the Interior. THE DEPARTMENT OF THE INTERIOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Second Circuit, *en banc*, which affirmed the dismissal of this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, on rehearing *en banc*, affirming the District Court's decision dismissing petitioners' action, which is reported at 537 F.2d 589, is appended hereto at A1.* The opinion of the three judge panel of the Court of Appeals for the Second Circuit, which is reported at 537 F.2d 571, is appended hereto at A51. The opinion of the United States District Court for the Southern District of New York, which is reported at 376 F.Supp. 327, is appended hereto at A89.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit, on rehearing *en banc*, was rendered on June 4, 1976. Pursuant to the order of Mr. Justice Marshall, dated August 18, 1976, petitioners were granted an extension of time in which to file this petition to and including November 1, 1976. This petition is filed within that time requirement. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

Question Presented

Whether the doctrine set forth in *Warth* v. *Seldin* should be extended to a context in which Congress has mandated benefits for a class and where an agency of the executive branch fails to carry out that mandate.

Statutes Involved

Title VIII of Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.;* Title VI of the Civil Rights Act of 1964, 42 U.S.C.

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* In this petition "A" refers to the appendix filed in this Court with the petition; "a" refers to the appendix filed with the Court below.

§ 2000d, *et seq.;* the Administrative Procedure Act, 5 U.S.C. § 702.

Statement of the Case

This petition seeks review of a decision by a sharply divided Court of Appeals, sitting *en banc* which held that petitioners lack standing to sue. The Court of Appeals divided on the question of whether it was appropriate to extend the doctrine of *Warth* v. *Seldin*, 422 U.S. 490 (1975) —forged in the context of broad constitutional claims against local zoning laws—to a case involving specific statutory challenges to federal agency decisions. Four of the ten judges sitting *en banc* dissented from the decision of the Court which accepted this extension of the *Warth* doctrine.

The petitioners are lower income minority residents of racially impacted areas of Westchester County, New York who seek to challenge grants by the Department of Housing and Urban Development (HUD) and the Department of the Interior to the Town of New Castle, a "predominantly white and well-to-do enclave" within the same County (A91).

The contested HUD grant is to aid New Castle in the development of a new sanitary sewer system; the Interior grant is for an open space project. It is asserted in the complaint that HUD and Interior, in making these grants, violated the requirements of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Law), 42 U.S.C. 3601, *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d), *et seq.* Petitioners maintain, *inter alia*, that the two agencies failed to follow their own civil rights procedures, that prior to approval of challenged grants the agencies were required to evaluate the economic and racial consequences of New Castle's housing and development practices, and that the grant approvals, made in the

face of the Town's discriminatory land use policies, have the effect of maintaining racial residential segregation in Westchester County, thereby perpetuating petitioners' continued residency in the County's racial ghettos (A94).

Westchester is a large suburban county situated immediately north of New York City. Petitioners live in the Westchester communities of Yonkers, Peekskill, White Plains and Ossining. These communities, along with Mount Vernon and New Rochelle, contain about 75% of the total non-white population in the County. About 10% of the County population is non-white and the minority population of New Castle is only 1.3% (A92).

The minority residents of Westchester are compelled to reside in racially concentrated neighborhoods in the County. For example, petitioner Patterson asserts in an affidavit filed in support of his claim to standing, that he has "resided in Westchester County since 1960, and during that time, I have always been constrained to reside in racially concentrated areas." Patterson's neighborhoods have always been "characterized by dilapidated housing and inadequate levels of municipal services" (87a-88a).

Petitioner Brooks alleges that he resides in a severely dilapidated apartment in Ossining (4a). Petitioner Evans was compelled to relocate from two different dwellings in Peekskill as a result of urban renewal demolitions (2a). Subsequent to the filing of the complaint Evans obtained a unit in a public housing development in Peekskill. Petitioner Kidd resides in a dwelling with serious plumbing and structural defects (3a). The District Court concluded that the petitioners' allegations of ghetto living conditions "are a very real and serious 'injury'" (A96).

New Castle is a wealthy, developing, exclusionary suburb. The 1970 median family income in the Town was over $22,000 as compared with $11,349 for the County as a whole (A92). New Castle encompasses about 25 square miles in area and has substantial amounts of vacant land.

About 90% of the Town is restricted, however, by local zoning laws, to development of single family units on parcels of at least one acre (26a-27a). Two-family homes, garden apartments and all other forms of multi-family housing are prohibited (26a-27a). This pattern has resulted in the exclusion of housing for lower income families. The district court in surveying the facts found that the median value of single family homes in New Castle in 1970 was in excess of $50,000 and that New Castle had "successfully thwarted" attempts by the New York State Urban Development Corporation to "construct a small 100 unit low-cost housing facility in the town. It is thus clear that New Castle continues to be resistant to attempts to alter its present housing character" (A92).

The HUD Grant

In 1969, New Castle, through a specially organized sewer district, requested aid from HUD under the Federal Water and Sewer Facilities Grant Program (42 U.S.C. 3102) for construction of a sanitary sewer facility in the hamlet of Chappaqua in New Castle. In early 1973, HUD approved that application.* As part of the civil rights review procedure that HUD followed for sewer grant applications, a "rating sheet" was to be completed by HUD officials on all proposed projects.

The record indicates that HUD at best paid little attention to the civil rights requirements in reviewing the New Castle sewer program application. Indeed, when a civil rights complaint was filed with HUD with respect to this grant, Department officials were unable to locate any rat-

* The sewer grant program in question has since been consolidated by Congress into the block grant community development program under the Housing and Community Development Act of 1974. 42 U.S.C. 5301, *et seq.* Currently, qualifying communities obtain block grant development funds which may be used for sewer projects or other development activities as designated in the 1974 Act.

ing sheet in the administrative file. To rectify this omission, an employee was directed to "reconstruct" the rating sheet (140a). The employee backdated the rating sheet to the time of the original award to New Castle to make it appear that the document was prepared contemporaneously with the review of the application (144a, 147a). When the administrative file was first turned over to petitioners and the Court, no explanation of the manner of the preparation of the rating report was provided (220a-221a).

Also, as a result of the civil rights complaint, HUD officials undertook to rate the New Castle application *de novo*. This review was conducted in the Regional Office of HUD. The new rating indicated that the New Castle application should have received no more than approximately 30 points (176a), instead of the 41 point total that appears in the reconstructed rating sheet (189a-190a). According to HUD officials, had the application received only 30 points when first reviewed, the grant would never have been awarded to New Castle (177a).

It is significant that the program approved by HUD will result in a sewer system which can only accommodate development of low density housing. Judge Oakes, in his dissenting opinion below, noted in this regard:

> The sewer grant is inconsistent with construction of high-density, low-cost housing in New Castle because, as is stated in an affidavit attached to the complaint, the sewer system planned by New Castle "will have the capacity to handle the needs of the area only if the area is developed at low densities. . . ." . . . [The] affidavit charged that HUD review of the sewer grant had wholly ignored the role which sewer systems play in shaping the parameters of future community development, and the impact of that development on low and moderate income housing opportunities within the region (A36).

The Interior Grant

In 1972 New Castle applied to the Bureau of Outdoor Recreation of the Department of the Interior for federal funds to aid in the acquisition and development of a public park and outdoor recreation area. That application was submitted pursuant to the Land and Water Conservation Fund Act, 16 U.S.C., § 460*l*-8. New Castle sought to acquire and develop approximately 33 acres of town land for an outdoor recreation area.

With respect to the Interior grant, there were no civil rights enforcement procedures. The Interior officials made no effort to determine the nature of New Castle's housing and community development practices and in fact were unaware of any obligation flowing from the Fair Housing Act obligating them to promote fair housing opportunities in connection with an outdoor recreation grant (202a-204a, 207a).

The Proceedings Below

Petitioners' complaint was filed in the United States District Court for the Southern District of New York in August, 1973. It was filed as a class action on behalf of low income minority residents of Westchester County (1a). Prior to answering, the federal respondents moved to dismiss the complaint on several grounds, including lack of standing of the petitioners to bring this action (A89). Petitioners moved for a preliminary injunction restraining the federal agencies from distributing any monies to New Castle pursuant to the contested grants (A89).

The District Court, after hearing argument on these motions, reserved decision and ordered that the administrative files be made available to the Court and that depositions of certain officials be taken (A91).

On March 9, 1974, the Town of New Castle and the special sewer district moved to intervene in this action. These respondents also joined in the pending motion to dismiss for lack of standing (A89-90).

On May 22, 1974, the District Court dismissed the complaint on the grounds that the petitioners lacked standing to sue (A89). In reaching its decision, the District Court relied heavily on the Second Circuit's then recent decision in *Warth* v. *Seldin,* 495 F.2d 1187 (2d Cir. 1974) (A94-99).*

On June 2, 1975, a three judge panel of the Second Circuit with one member dissenting reversed the District Court holding (A51). On August 11, 1975, the Second Circuit granted petitions by the respondents for the appeal to be reheard *en banc.* The August 11th order also provided that Judge Moore, a senior judge who had participated in the initial panel, would sit with the permanent members of the Court on the rehearing.

On June 4, 1976, the Court issued its opinion. Six members of the Court disagreed with the first panel's holding and affirmed the District Court's dismissal of the complaint. Four members of the Court dissented.

Central to the majority's view was that the instant case was controlled by this Court's ruling in *Warth* v. *Seldin,* 422 U.S. 490 (1975). Judge Moore, writing for the majority stated that like the petitioners in *Warth,* who challenged exclusionary and discriminatory zoning laws in the suburban town of Penfield, New York on constitutional grounds, the petitioners here too have failed to allege facts "indicative of injury suffered by them as a result of the grants" to New Castle (A15).

The dissenting members of the Court asserted that the instant case is sharply distinguishable from *Warth.* Judge Oakes noted that the issue in *Warth* was "whether a town in which the plaintiffs are not resident may exclude persons of low and moderate income by its zoning laws" (A30-31), while the instant case involves a claim of non-compliance

* Petitioners' motion to certify the class was not resolved in the District Court because of the granting of the motion to dismiss (A100, n. 9).

by federal agencies with statutory civil rights requirements and not a constitutional challenge as in *Warth.* Judge Oakes also stated that the majority simply missed the point of the lawsuit in asserting that petitioners looked to use of the funds for other projects in the County in the event of disapproval of the grants.

> Rather, appellants' claim is that the federal departments violated affirmative action requirements of the Civil Rights Acts by making grants to municipalities without evaluating the economic and racial consequence of their housing and development practices, with the effect of maintaining racial residential segregation in Westchester County, further constraining them to continued residence in the county's ghetto (A33).

Judge Oakes emphasized that the petitioners' injury flowed from agency non-compliance with Congressionally dictated civil rights requirements and that the non-compliance tended to perpetuate economic and racially discriminatory housing practices in the County. This harm, Judge Oakes stated, was sufficient to grant petitioners standing to contest the agencies' deviations from their statutory obligations.

> Government actions which allegedly perpetuate (if not exacerbate) the injuricus conditions of segregative housing seem quite plainly to effect an injury-in-fact to the precise type of interest which Congress intended to protect when it enacted Titles VI and VIII of the Civil Rights Act. The apparent thrust of those Titles is to assure that federal grants are consistent with the objectives of non-discriminatory, fair housing (A37).

Reasons for Granting the Writ

I.

As the decision below indicates, there are sharply divergent views among the federal judges as to the propriety of extending the doctrine of *Warth* v. *Seldin* to a context in which Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. This Court should grant review to resolve this divergence and to prevent the extention of *Warth* to the point where federal agencies can exercise with impunity a "silent veto" over civil rights legislation.

The Second Circuit in denying standing to petitioners held that the *Warth* decision was controlling and that the petitioners lacked sufficient injury to permit them to challenge HUD and Interior's alleged non-compliance with civil rights statutes. The lower court has thus extended the *Warth* doctrine, which was articulated in the framework of a broad constitutional challenge to suburban restrictive zoning practices, to the area of judicial review of administrative actions in a civil rights context.

Judge Gurfein, in his opinion on the rehearing, succinctly set forth the dissenting judges' fundamental objection to the extension of *Warth* in this fashion. Judge Gurfein observed:

> There is need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. The contrary would give the Executive a silent veto not provided in the Constitution (A48-49).

The dissenters strongly argued that this case differed substantially from *Warth* and that grave and unwarranted

restrictions have been placed by the Court on the types of litigants who may seek judicial review of agency non-compliance with civil rights statutes.

The effect of the holding below may well be to foreclose all federal judicial review in this area. If minority citizens subjected to residency in racial ghettos in Westchester County lack standing to contest an agency refusal to apply a Congressional directive to act affirmatively to alleviate their condition, then truly no party will be able to show sufficient injury to be entitled to enter the judicial forum. Nor, in this case is it adequate to look for a response through the political process for the alleged legal wrong. See *United States* v. *Richardson,* 418 U.S. 166 (1974). The political process itself has already functioned through the enactment of a body of civil rights laws. Congress has created the requirements that federal agencies act affirmatively to promote equal housing opportunities and the issue in this case is only whether the beneficiaries of those laws may seek judicial redress to insure administrative compliance.

The petitioners charge in their complaint that HUD and Interior, in approving community development grants to New Castle, failed to comply with the directives of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964 requiring affirmative action to secure equal housing opportunities and an end to discrimination in federal programs. Title VIII of the 1968 Law provides in 42 U.S.C. § 3608(d)(5) that the Secretary of HUD must "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the purposes" of the Fair Housing Law. 42 U.S.C. 3608(c) applies the same affirmative action mandate with respect to programs of housing and urban development to all other federal executive departments and agencies. That section also instructs that these other agencies cooperate with HUD in this endeavor. These directives are to be read in conjunction with the legislative

purpose of the Fair Housing Law which establishes that, "It is the policy of the United States to provide within Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Title VI of the Civil Rights Act of 1964 bars discrimination in federal programs and requires affirmative action by governmental departments to achieve equal opportunities in such programs. 42 U.S.C. §§ 2000d and 2000d-1.

There is no doubt that a major goal of these statutes is to eliminate patterns of residential segregation and the confinement of minority citizens to ghetto areas. HUD itself, for example, deemed the affirmative action requirements of the Fair Housing Law as applicable to sewer grants to suburban communities and designed the civil rights rating sheet as a means of responding to the Congressional directive. Further, the nature of a sewer development in a suburban town plays a critical role in "shaping the parameters of future community development" and has a critical impact on possible development of "low or moderate income housing opportunities within the region" (A36).

The lower income minority petitioners in this case suffer from a lack of fair housing opportunities in a county in which they now reside. They are residents of minority ghetto communities of Westchester County. But for a lack of civil rights enforcement alleged in the complaint—allegations supported by the administrative records in this action—the petitioners would have had the benefit of a significant federal impetus for creation of fair housing opportunities and the elimination of racial residential segregation in the County. This impetus was what Congress sought in enacting the affirmative action requirements of the Fair Housing Law and Title VI. Petitioners maintain therefore that they are directly and immediately injured by the failure of these agencies to comply with a Congressionally dictated policy.

The Second Circuit applied *Warth* v. *Seldin,* to foreclose judicial challenges to agency non-compliance with the affirmative action mandate, although the complainants in *Warth* did not assert "any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claims." 422 U.S. at 513. In *Warth,* the Court also stated that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. 422 U.S. at 513-514. See, also, *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617, n. 3 (1973): *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 212 (1973).

It should be noted that, with respect to the statutory claim involved in this case, this Court in *Trafficante* declared that the Fair Housing Act evinced a Congressional intention to define standing as broadly as is permitted by Article III of the Constitution. 409 U.S. at 209. In *Trafficante* white persons were held to have standing even though they were not the object of discrimination. The injury alleged was "loss of important benefits from interracial association." 409 U.S. at 210. The adversary interest of the petitioners here is even more compelling as they suffer directly from discrimination and continued ghetto residency.

Furthermore, in *Association of Data Processing, Inc.* v. *Camp,* 397 U.S. 150, 154 (1970), the Court, in analyzing the concept of "aggrieved" persons entitled to challenge a federal agency action or inaction, emphasized, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of 'aggrieved persons' is symptomatic of that trend." In *United States* v. *SCRAP,* 412 U.S. 669 (1973), the plaintiffs were found to have standing to question the Interstate Commerce Commission's alleged violation of the National Environmental Policy Act of 1969 (NEPA), 42

U.S.C. 4332(2)(c), in allowing a rate increase for railroad freight. Standing was found notwithstanding an "attenuated line of causation." 412 U.S. at 688. See also *Barlow* v. *Collins*, 397 U.S. 159 (1970).

The decision below in the instant matter deviates substantially from the *Data Processing*, *SCRAP*, and *Barlow* v. *Collins* holdings, which call for judicial scrutiny of agency actions.* This Court should resolve whether in fact *Warth* limits these decisions as the Second Circuit suggests.

The majority opinions below also fail to address the issue of the applicability of the Administrative Procedure Act, 5 U.S.C. § 702. Judge Mansfield, in his concurring opinion, focuses instead on the terms of the civil rights statutes and asserts that there is no authority in either 42 U.S.C. 2000d, *et seq.*, or 42 U.S.C. § 3608, granting to individuals a right to sue. He therefore concludes that the petitioners had no standing to contest the non-enforcement by the federal officials of these civil rights provisions (A22-23).

With respect to the Fair Housing legislation, Judge Mansfield states that § 3612, which authorizes the filing of private civil actions to enforce certain provisions of the Fair Housing Law, does not make reference to the requirements imposed on administrative agencies under § 3608. Judge Mansfield also notes that § 3610 is "limited to suits against private persons alleged to have violated the Act, which may be brought only after voluntary compliance proceedings before the Secretary of HUD have failed" (A23). Judge Mansfield concludes, "Surely if Congress

* This Court's recent holding in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 48 L.Ed. 2d 450 (1976), does not conflict with this line of cases. The *Simon* case arose in the unique context of a challenge to the tax status of a third party. Also the *Simon* claimants challenged the propriety of a ruling promulgated by the IRS, the agency charged with the duty of interpreting and enforcing the Internal Revenue Code. The issue here is far different as the challenge goes to the matter of official non-compliance with a clear statutory directive.

had intended judicial review of HUD's alleged maladministration of the Act, it would not have excluded § 3608 from those sections that might be enforced by private action" (A23).

The obvious response to this position is that the Administrative Procedure Act, 5 U.S.C. § 702, has long granted to an "aggrieved person" the right to remedy in a judicial proceeding administrative inactions. There is no presumption flowing from the terms of § 3612 that Congress intended the Administrative Procedure Act to be inapplicable to the Fair Housing Law. The more logical assumption is that Congress made specific reference to enforcement by civil action of §§ 3603-3606 under § 3612 because new rights were being established and there existed a need to create a jurisdictional basis for enforcing those rights.

Certainly, the legislative history of Title VIII indicates a congressional intent to correct the federal government's own sordid involvement in supporting segregation in housing and an intent to break down ghetto walls (See, A60-61). It is also clear that Congress in enacting both the 1964 and 1968 Civil Rights laws was responding to a call for action by a host of governmental commissions and agencies for remedial legislation in the area of housing and civil rights. As Mr. Justice Stewart stated in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968), Title VIII establishes a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." In *Trafficante*, the Court stated that in connection with fair housing litigation, "a main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." 409 U.S. at 211.

Congress certainly sought through the civil rights legislation, and particularly through Title VIII, to relieve patterns of residential segregation. A primary method for

accomplishment of that goal was by aggressive administrative acts at the federal level. Congress called upon the federal agencies to act affirmatively to meet that goal. The intended beneficiaries of such action are by necessity those residing in pockets of racial isolation in our metropolitan communities. They are the "aggrieved" class and they are the ones who must, and do, have standing to insure that the Congressional mandate is complied with.

Petitioners strongly urge that they should not be foreclosed from a trial on the critical issues raised in this matter. They should not be denied this right at the threshold of their lawsuit by an argument that they do not present sufficient adversity of interest to merit a hearing. The very spirit, policy and purpose of the laws in question virtually dictate that the courts assume jurisdiction. Without such an assumption of judicial responsibility, the laws in question may well become a mere dead letter and a mockery of the efforts of Congress to enact remedies to protect the rights of minority citizens.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this writ of certiorari.

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